

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 10 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0319-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
PATRICK MICHAEL WESTOVER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100274008

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF GRANTED IN PART AND DENIED IN PART

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Tucson
Attorneys for Petitioner

ESPINOSA, Judge.

¶1 Patrick Westover petitions this court for review of the trial court’s summary denial of his of-right petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). A trial court abuses its discretion by summarily dismissing a petition for post-conviction relief if the petitioner’s allegations, taken as true, might have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

¶2 Westover pled guilty to solicitation to sell a dangerous drug, and the trial court sentenced him to a presumptive, 2.5-year prison term. He filed a notice and petition of post-conviction relief, arguing his trial counsel had been ineffective for failing to explain to Westover that he had a “viable” mere presence defense and, had Westover understood such a defense was available, he would not have entered the guilty plea. Westover also asserted, without citation to authority, that he should be permitted to withdraw his guilty plea because the factual basis was “false.”

¶3 The trial court summarily denied relief. The court concluded Westover would not have been entitled to a mere presence instruction; that even if he would have been entitled to such an instruction, his trial counsel still should have advised him to accept the plea offer; and that Westover had not demonstrated prejudice because it was “completely incredible that a defendant would take a plea based on accomplice liability advice but not after finding out about a weak mere presence defense.” The court also rejected Westover’s claim based on the accuracy of the plea’s factual basis—treating the claim as one of ineffective assistance of counsel and determining that Westover’s

counsel's conduct "did not constitute ineffective assistance" and Westover had not demonstrated resulting prejudice.

¶4 Westover reurges both claims in his petition for review, contending his claims are colorable and he is entitled to an evidentiary hearing. He first argues the trial court erred in concluding he would not have been entitled to a mere presence instruction and his counsel therefore had not fallen below prevailing professional norms in failing to advise him about that defense. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). In this context, Westover must provide evidence that, when taken as true, establishes that competent counsel would have advised him about a mere presence defense, and that Westover's decision to plead guilty was involuntary—that is, he would not have pled guilty had he been aware that such a defense was viable. *See State v. Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d 499, 504 (1998); *Watton*, 164 Ariz. at 328, 793 P.2d at 85.

¶5 We agree with Westover that he was entitled to a mere presence instruction at trial. Westover had accompanied his mother to purchase methamphetamine for an undercover police officer. He admitted to police he had "volunteered t[o] make sure that [his mother] didn't get ripped off by the dude or anything like that" and had gone to protect her, as he had done on other occasions. The state initially charged Westover with sale of a dangerous drug and conspiracy to sell and/or possess a dangerous drug for sale.

The indictment included citations to the accomplice liability statutes, A.R.S. §§ 13-301 through 13-303.

¶6 Although Westover’s statements to police strongly suggested he was liable as an accomplice and was not merely present, *see* §§ 13-301 through 13-303, “[w]hen the issue is accomplice liability based on actual presence, a mere presence instruction provides a necessary aid to jurors in properly interpreting the acts of the accused accomplice and divining his true intent.” *State v. Noriega*, 187 Ariz. 282, 286, 928 P.2d 706, 710 (App. 1996). Thus, “in a prosecution for accomplice liability based on actual presence, the trial judge must, if requested, give a mere presence instruction.” *Id.*

¶7 Westover included with his petition for post-conviction relief an affidavit by a former criminal defense attorney stating Westover had a “solid” mere presence defense and his trial counsel’s failure to discuss it with Westover “fell below minimum standards of competence.” The relative strength of any potential mere presence defense—and thus whether trial counsel should have discussed that defense with Westover—is a factual question the trial court could not properly resolve without conducting an evidentiary hearing. *Cf. State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (expert testimony relevant to determination “whether counsel’s performance was reasonable under all the circumstances”). The court instead was required to accept as true the attorney’s assertion that the defense was “solid” and that counsel should have discussed it with Westover, as well as Westover’s assertions that his trial counsel had not discussed the defense with him and he would not have pled guilty had he known the defense was viable at trial. *See Watton*, 164 Ariz. at 328, 793 P.2d at 85. Accordingly,

Westover is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel, and the court abused its discretion in summarily denying relief. *See Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d at 504; *Watton*, 164 Ariz. at 328, 793 P.2d at 85.

¶8 We reject Westover’s argument, however, that he is entitled to relief based on the purportedly false factual basis of his plea. Westover agreed at the change-of-plea hearing that he had “tr[ie]d to sell . . . methamphetamine.” Westover asserts that, because other evidence suggests he did not actually participate in the sale and was, at most, an accomplice, the basis for the plea was “false.” Westover also asserts he did not seek to raise the issue as a claim of ineffective assistance of counsel but instead under Rules 32.1(h) and 17.5, Ariz. R. Crim. P. Westover at least arguably raised a claim under Rule 32.1(h)—his petition for post-conviction relief cited that subsection, although not in relation to any particular argument. But his petition cannot fairly be read to raise a claim under Rule 17.5 because it cites neither the rule nor any pertinent authority and, accordingly, we do not address that aspect of his argument. *See Ariz. R. Crim. P. 32.9(c)(1)(ii)* (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not be raised for first time in petition for review).

¶9 Moreover, even if we construe Westover’s petition for post-conviction relief as having raised a claim under Rule 32.1(h) that was not addressed by the trial

court, any such claim is meritless. Assuming that the factual basis given for the plea was false,¹ as Westover alleges, that is not a proper basis for relief under the rule.

¶10 A petitioner is entitled to relief pursuant to Rule 32.1(h) only if he or she “demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt.” Provided that it was knowingly and intelligently entered, however, Westover’s guilty plea precludes a claim of innocence. *See State v. Norgard*, 92 Ariz. 313, 315, 376 P.2d 776, 778 (1962) (characterizing as “frivolous” motion to withdraw from plea when “the only basis given . . . was that the defendant apparently changed his mind and claimed to be innocent”); *State v. McFord*, 125 Ariz. 377, 379, 609 P.2d 1077, 1079 (App. 1980) (agreeing with trial court that “when a plea is knowingly and voluntarily entered with effective assistance of counsel, and when there is a factual basis for the plea, the foundation and purpose of plea bargaining would be undermined by allowing a party to later recant and request withdrawal of his guilty plea”). Indeed, Westover waived his right to have his guilt determined beyond a reasonable doubt. He cannot now rely on that right as a basis to withdraw his plea. *See State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (plea agreement waives all non-jurisdictional defects, including deprivations of constitutional rights); *see also State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987

¹Although the plea agreement incorporated the grand jury transcript as part of the factual basis, the trial court did not expressly consider it at the change-of-plea hearing. We also observe Westover does not claim the factual basis was insufficient, only that it was incorrect.

(1994) (factual basis requires only “‘strong evidence’ of guilt and does not require a finding of guilt beyond a reasonable doubt”), *quoting State v. Wallace*, 151 Ariz. 362, 365, 728 P.2d 232, 235 (1986).

¶11 For the reasons stated, we grant review and remand this case to the trial court for an evidentiary hearing on Westover’s claim of ineffective assistance of counsel. In all other respects, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge